

**38 CFR Part 13****RIN 2900-AR11****Fiduciary Bond**

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) amends its regulations that govern fiduciary activities. More specifically, the amendments revise specific procedures to exempt a VA-appointed fiduciary who is also serving as a court-appointed fiduciary from posting multiple bonds and to also exempt a VA-appointed fiduciary that is also a State agency with existing, State-mandated liability insurance or a blanket bond from having to obtain an additional bond payable to the Secretary of Veterans Affairs (Secretary).

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Kevin Baresich, Program Analyst, Pension and Fiduciary Service (21PF), Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420, (202) 632-8863. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: In a document published in the Federal Register on September 29, 2021, at 86 FR 53913, VA proposed to amend its fiduciary activity regulations by providing an exception to certain eligibility requirements to exempt a VA-appointed fiduciary who is also a court-appointed fiduciary, or a State agency with existing State-mandated liability insurance or a blanket bond from obtaining a separate surety bond payable to the Secretary. The 60-day public comment period ended on November 29, 2021. VA received comments from two individuals.

The first commenter was fully supportive of the proposed rule. The other commenter was not in support of the proposed rule. Neither commenter recommended revisions to the proposed rule. However, the second commenter expressed general concerns with the purpose of the rulemaking. The commenter opposed the exemption of a VA bond requirement, even if redundant, to protect a VA beneficiary's funds. The commenter was not persuaded that a bond made payable to the Secretary is unnecessary when VA funds under management are also protected by bonds ordered by a court, State-mandated liability insurance, or a blanket bond. The commenter believed that a VA-specific bond provides an additional layer of protection and safeguards the funds of a vulnerable VA beneficiary. However, the commenter did not explain how removing redundant coverage would increase risk to beneficiaries. We do not agree that our proposed regulation would disadvantage a VA beneficiary or limit any protections provided and make no changes based upon this comment.

In 2018, VA amended its fiduciary program regulations. 83 Fed. Reg. 32716 (July 13, 2018). VA promulgated new regulations meant to establish a national standard for the appointment and supervision of VA fiduciaries. Specifically, VA implemented a requirement that certain potential VA fiduciaries obtain a surety bond payable to the Secretary to ensure that VA would be able to recoup misused funds from a surety company as opposed to initiating collections against a fiduciary. 38 CFR 13.230(d). However, as explained in the proposed rule, we recognize that the purpose for which this requirement was imposed would be defeated in instances where a court-appointed fiduciary or State-agency already had a bond in place. We noted that in these instances, the bond typically would be payable to the state where the court is located, and for this reason VA would be unable to make a direct claim against that bond. This circumstance highlighted a potential problem with VA's practice of requiring multiple bonds, that if a surety company already paid out on a misused-benefits claim under a state-court bond,

another surety company would not pay out on a VA bond for the same misconduct. Therefore, a second bond would not satisfy its intended purpose. Further, it would not make sense to burden a VA beneficiary with paying a second bond premium where there already is adequate protection in place. Indeed, to do so would be contrary to VA's core mission to ensure that a VA beneficiary's benefits are managed in their best interest. A VA beneficiary would not be financially disadvantaged by the removal of a duplicative bond requirement because VA is now required to reimburse a beneficiary of any misused funds. 38 U.S.C. 6107.

Finally, the same commenter stated that if a fiduciary breaches his or her duties as a fiduciary, that individual should be held accountable by both the State and VA. The amendments under this rule do not waive VA's obligation under the law to hold a fiduciary who has misused VA benefits accountable for such misuse. 38 CFR 13.400, 13.500.

VA adopts the rule as proposed without change.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs has determined that this rule is not a significant regulatory action under Executive Order 12866. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at www.regulations.gov.

Paperwork Reduction Act

This final rule includes provisions constituting a revised collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521) that require approval by the Office of Management and Budget (OMB). Accordingly, under 44 U.S.C. 3507(d), VA has submitted a copy of this rulemaking action to OMB for review and approval.

Regulatory Flexibility Act

The Secretary certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. This regulation has the potential to impact all 2,350 small entities within the North American Industry Classification System Code 524126 (casualty and bonding companies). There is a projected loss of revenue of \$66,989 per firm which yields a 0.16% revenue loss to each entity. Based on this analysis, the Secretary certifies that the adoption of this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This final rule would have no such effect on State, local, and tribal governments, or on the private sector.

Assistance Listing

The Assistance Listing program number and title for programs affected by this rule are as follows: 64.104, Pension for Non-Service-Connected Disability for Veterans; 64.105, Pension to Veterans Surviving Spouses, and Children; 64.109, Veterans Compensation for Service-Connected Disability; and 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death.

Congressional Review Act

Pursuant to Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (known as the Congressional Review Act) (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

List of Subjects in 38 CFR Part 13

Surety bonds, Trusts and trustees, and Veterans.

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, approved this document on May 5, 2022, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Luvenia Potts
Regulations Development Coordinator
Office of Regulation Policy & Management
Office of General Counsel
Department of Veterans Affairs

For the reasons stated in the preamble, the Department of Veterans Affairs amends 38 CFR part 13 as set forth below:

PART 13 – FIDUCIARY ACTIVITIES

1. The authority citation for part 13 continues to read as follows:

Authority: 38 U.S.C. 501, 5502, 5506-5510, 6101, 6106-6108, and as noted in specific sections.

Source: 83 FR 32738, July 13, 2018, unless otherwise noted.

2. Amend § 13.230 by revising paragraph (c)(1) to read as follows:

§ 13.230 Protection of beneficiary funds.

(c) ***. (1) The provisions of paragraphs (a) and (b) of this section do not apply to:

(i) A fiduciary that is a trust company or a bank with trust powers organized under the laws of the United States or a state;

(ii) A fiduciary who is the beneficiary's spouse;

(iii) A fiduciary in the Commonwealth of Puerto Rico, Guam, or another territory of the United States, or in the Republic of the Philippines, who has entered into a restricted withdrawal agreement in lieu of a surety bond;

(iv) A fiduciary that is also appointed by a court and has obtained a state-court bond, as referenced in 38 CFR 14.709, sufficient to cover both VA and non-VA funds; or

(v) A fiduciary that is also a state agency with existing, state-mandated liability insurance or a blanket bond sufficient to cover both VA and non-VA funds.

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